CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1945.

No. 644....

WILLIAMS-BAUER CORPORATION and
CONTI-WILLIAMS CORPORATION,
Petitioners,

vs.

GIOROLOMO DEPASQUALE, JOSEPH CIMINNA
and WILLIAM MORTON,
Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit and Brief in Support of Petition.

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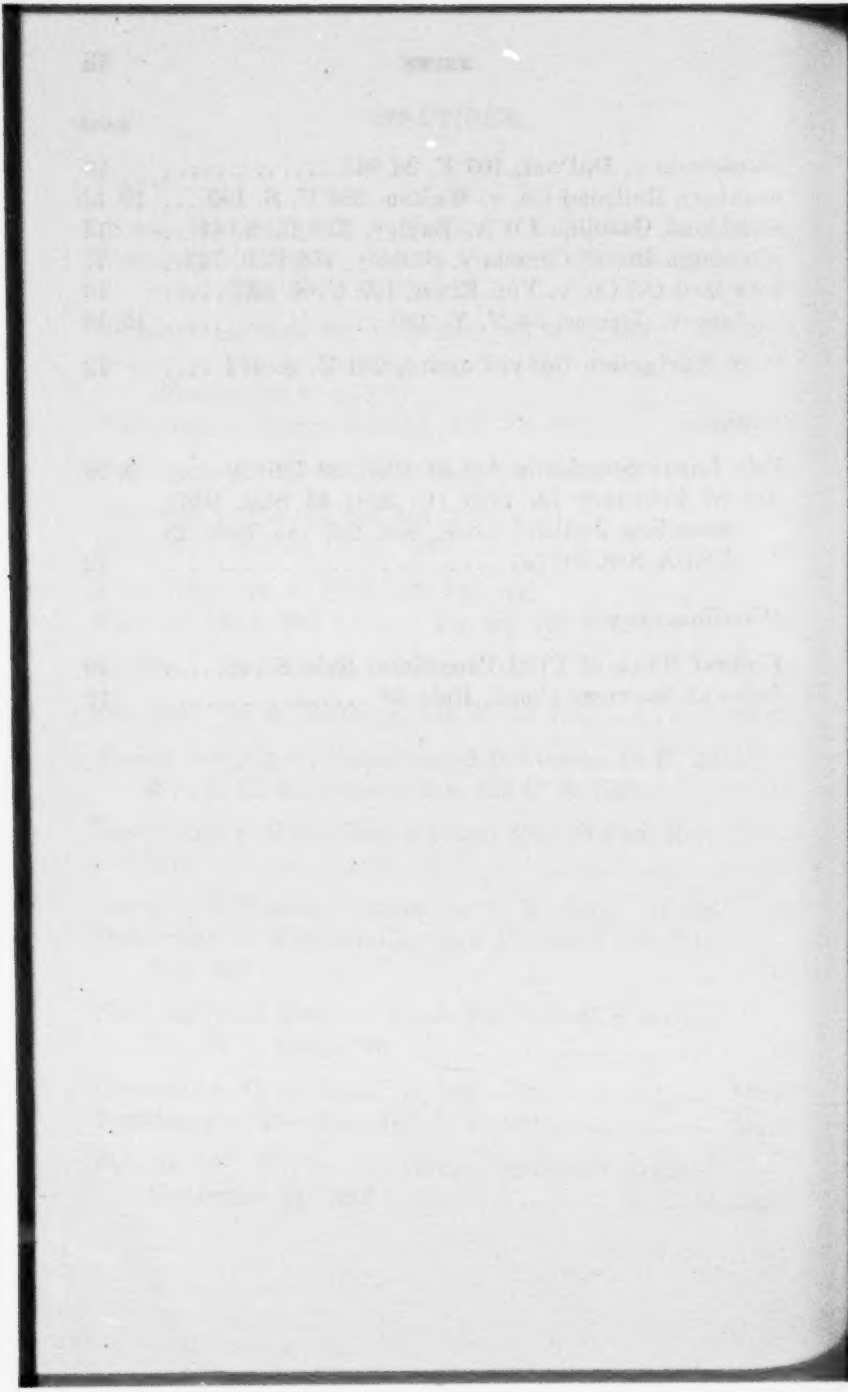

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit and Brief in Support of Petition.

To the Honorable Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

Summary Statement of Matter Involved.

In the United States District Court for the Southern District of New York, a money judgment was recovered on January 26, 1945 (R. 469), following a trial by jury, against the two petitioners as employers, by the three respondents as employees, pursuant to the provisions of Section 16(b) of the Fair Labor Standards Act of 1938

(29 U. S. C. A. Section 201 *et seq.*) for unpaid overtime compensation, liquidated damages and attorney's fees.

In the answer, the petitioners admitted that they were engaged in production for commerce and that the activities of the three employees were necessary for such production, admitted also that the employees worked overtime hours at various times, but asserted they were paid for all hours worked by them, in full, both at straight time and overtime.

In addition, the answer (R. 15) set up certain affirmative defenses, which, on motion before trial, were struck as insufficient in law on their face, and an intermediate order entered so striking them from the petitioners' answer (R. 24).

The second affirmative defense, so struck, was as follows:

Second Defense—Account Stated—based on allegations that it was the custom and usage, during respondents' periods of employment, for each employee to receive, each week on payday, a statement of the amount due for wages, wages due for straight time and wages due for overtime, as also the total amount due, and the number of hours worked, during the week he was being paid for; that in fact each respondent as such employee was given such a statement each week, that the statement was always accepted by plaintiff, and no complaint or objection made "with respect either to the amount of wages found due to him or the number of hours shown as worked by him during the preceding workweek"—until the action was commenced, "long after a reasonable period of time had elapsed"; that there was an account stated each week, and each respondent as such employee was always "fully paid all sums found due on said accounts stated".

The seventh defense (by Williams-Bauer Corporation against Morton only), was as follows:

Seventh Defense—Accord and Satisfaction—that before suit, under a settlement agreement, Williams-Bauer Corporation paid Morton $45 which he accepted and received "in full satisfaction and discharge" of his claim, and that "at the time of such payment, and accord and satisfaction, as aforesaid, defendant in good faith disputed and denied its liability to said plaintiff with respect to the matters alleged in the complaint".

The petitioners do not here stand on the other affirmative defenses set up in the answer.

At the time of filing their appeal from the judgment in the District Court, the petitioners appealed from the intermediate order dismissing the affirmative defenses set up in the answer. The United States Circuit Court of Appeals for the Second Circuit has affirmed the judgment in favor of the respondents against the petitioners. Said judgment of affirmance was entered November 2, 1945.

Petitioner prays that a writ of certiorari issue to review the judgment of affirmance of said Circuit Court.

Petitioners were engaged in salvaging materials from rubbish dumped by New York City trucks at the city's incinerators. The rubbish was dumped into a pit, from which it was conveyed upon a moving conveyor belt, passing the workers who picked the salvaged materials as the belt moved past them; most of this was paper, and the paper and other materials were later baled and prepared for shipment.

DePasquale, one of the respondents, picked off the moving belt, but sometimes he worked at baling or loading (R. 62, 63, 65, 66). Morton was a pressman, baling paper and other materials, and sometimes he loaded (R. 119, 147). Ciminna worked picking off the moving belt exclusively (R. 161).

In the presentation of the respondents' case, no attempt was made to rely upon any records whatever in order

to compute the number of overtime hours respondents claimed they worked each week over a period of over four years; but, instead resort was had to testimony by each plaintiff that he came in to work at a certain time in the morning, and that on some of the days in the week he worked until a certain time, giving approximations, and on other days at certain other times, giving approximations (R. 45, 47, 50, 51, 85, 86, 120, 121, 122, 139, 149, 153, 162, 163, 164, 165, 167). From these approximations, it was contended that DePasquale worked at least 72 or 73 hours each and every week of his employment (R. 54, 56), that Morton worked at least 63, 65 hours during each and every week of his employment (R. 124, 125, 127, 128), that Ciminna worked at least 54, 55 hours during each and every week of his employment (R. 157, 211, 216).

Cross-examination (a) developed a most remarkable series of sworn contradictions on the part of each of the three respondents, not only as to the starting time and quitting time of himself, but also of his two co-plaintiffs, demonstrating not a regular work-schedule of hours, but an irregular work-schedule of hours (R. 120, cf. 139, 74, 167—147 cf. 50, 114—121 cf. 149, 50, 51, 85, 86, 70, 71—151 cf. 76, 77, 78—153, 154 cf. 170—47 cf. 50, 51, 86—73 cf. 74), (b) resulted in a demolition of Morton's claim that he worked at least 63 hours during each and every week of his employment, (c) demonstrated a wholly irreconciliable repugnance between the claims of DePasquale and Ciminna and (d) elicited diametrically opposite statements of the lunch hour time periods.

Morton testified that he did on various occasions keep track of his workhours, that he compared his own record with the timekeeper's and found he was one dollar and change short—sometimes even less, so small an amount that he did not bother to complain (R. 132, 261). But on the trial Morton claimed, and received at the hands of

the jury, as unpaid overtime compensation (before the addition of liquidated damages) $12, $13, $14 and as high as $19.79 as weekly shortages, according to a schedule which was prepared and offered in evidence (Testimony of George M. Aronwald, pp. 285-303). Morton admitted on cross-examination, with respect to two specific weeks the dates of which were determinable, that he worked only 42 hours during such weeks and not 63 hours which he had claimed, and for which he actually recovered from the jury (R. 132-138, 261).

Ciminna's duties, admittedly, were confined to working at the moving belt (R. 160, 161); the belt did not start moving until 8:15 A. M. when the trucks started coming in (R. 75, 317); to make up the additional hours, in order to support the claim of a 54 hour workweek minimum, Ciminna testified that he commenced work at 7:30 A. M., and that between that time and 8:00 A. M. he did the cleaning under the belt (R. 161); but DePasquale had testified, when explaining why he worked after 4:30 P. M. when the belt stopped, in order to show the balance of the 72 hours minimum he claimed to have worked each week, that it was his job, working with several other men, to work each afternoon at the time when the belt stopped, cleaning under the belt, so that when they got through with their work "it was clean" and that the purpose was "so that in the morning everybody could go right to work" (R. 68, 76).

The length of the lunch period was a factor in the computation of the worktime of the men. DePasquale and Morton, working side by side each day for a period of over four years, gave the following diametrically opposed accounts of the lunch period: DePasquale claimed that each and every week, the employees had one hour for lunch on Mondays, Tuesdays and Wednesdays but that on Thursdays, Fridays and Saturdays he and three others had only 20 to 30 minutes for lunch (R. 45, 50, 115);

Morton's story was quite the opposite, saying that it was on Thursdays, Fridays and Saturdays the men had a one hour lunch period and that it was on Mondays, Tuesdays and Wednesdays the men (all of them, not merely four) had a 20 to 30 minutes lunch period (R. 121, 147, 148).

With respect to the special defenses, stricken out on motion, the District Court held (R. 467) with regard to the defense of account stated that "Nothing that the employer or employee may do contrary to its terms can be availed of to prevent the enforcement of the Act"—in effect, a holding that the defense cuts down the wages that an employee may recover, although there is nothing in this defense which does that; and, with regard to the defense of accord and satisfaction, stated merely that it was dismissed "for the same reason stated with respect to the second defense".

In its opinion, passing on the sufficiency of these defenses, the Circuit Court stated that the defense of account stated was insufficient; it being the law that "an express agreement to work for less than the statutory rate is invalid * * * surely an account stated can stand no higher"—although the defense does not deprive the employee of anything, but searches the evidence for the truth and goes to the heart of the question as to what the employee is really entitled to; and with regard to the defense of accord and satisfaction, the Circuit Court said the defense did not fall "within the caveat which we threw out in *Gangi* v. *D. S. Schulte Inc.* * * * neither defendant pleads adequate facts to show the applicability of this suggestion"—although in the *Gangi* case the Circuit Court was passing on the facts adduced during a trial testing the sufficiency of evidence, while here it was a ruling on a pleading only that was involved, testing only the sufficiency of a pleading.

As to the appeal taken from the judgment, the Circuit Court dismissed petitioners' contention that the respondents had not made out a case, because there was not substantial "truthful" evidence to support a verdict and that the testimony of the three plaintiffs was not worthy of credence so that the motion of dismissal should have been granted—saying, that it was being asked to usurp the functions of the jury; the Court failed to make any comment on the cases urged by petitioners in support of their contention.

Jurisdictional Statement.

It is submitted that the United States Supreme Court has power and jurisdiction to review the judgment here in question under the Act of February 13, 1925 (C. 229; 43 Stat. 936) amending the Judicial Code, Section 240 (a) Title 28 U. S. C. A. Section 347 (a); and under Rule 38, Subdivision (5) of the Rules of the Supreme Court.

Questions Presented.

The questions to be resolved by the Supreme Court are as follows:

1. Whether the affirmative defense of account stated is applicable to transactions between employer and employee where, in litigation between them, the sole question in issue is how many hours did the employee actually work, and the employer does not put in issue any question of law regarding the applicability of the Fair Labor Standards Act, pursuant to which the action is brought.

2. Whether, in such a case, an employer may plead accord and satisfaction, upon alleging that there was an honest dispute at the time of the accord with regard to the matters referred to in the complaint.

3. Whether, in such a case, and assuming such a defense may be pleaded, is it sufficient to plead the ultimate facts, or must the evidentiary facts be pleaded.

4. Whether, in such a suit, where plaintiffs do not rely upon records in order to furnish the basis for correct computations, but testify to their working time in general terms, and it appears, considering only the direct and cross-examinations of the plaintiffs themselves, that the workhours were highly irregular, that the number of hours worked each week is not clear, and that the nature of the testimony is such as to demonstrate the falsity of the plaintiffs' claims, is there substantial evidence of a satisfactory sort which may be made the basis for a verdict at the hands of a jury, and must such a case go to the jury, regardless of the serious weaknesses developed regarding such claims.

Reasons Relied on for Allowance of Writ.

A. In holding that an account stated may not be pleaded as a defense in an action brought under the Fair Labor Standards Act, the Circuit Court for the Second Circuit has decided that a common-law defense may not be pleaded; this case appears to be the first which presents this question for decision by the Supreme Court; the Circuit Court has thus decided an important and substantial question of Federal law which has not been and should be settled by the Supreme Court.

B. In holding that the defense of account stated is not applicable, the Circuit Court for the Second Circuit has decided an important question of general law which, it is respectfully submitted, is probably untenable, and, because the applicability of the law is not put in issue, is in conflict with the weight of authority.

C. In holding that the defense of accord and satisfaction is not sufficient in law, the Circuit Court for the Second Circuit has decided an important question of Federal law which has not been, and should be decided by this Court, where in the pleading it is alleged that the accord was arrived at following an honest dispute as to the employee's work and pay, and in holding that this defense is not sufficient because evidentiary facts are not pleaded, the Circuit Court has decided an important question of general law in a way which is probably untenable. This Court has granted certiorari to test the sufficiency of this type of defense, where a *bona fide* dispute is alleged (*D. S. Schulte Inc.* v. *Gangi*, No. 517, writ granted November 19, 1945), and a similar question is presented here, except that here it is the construction of a pleading that is involved instead of sufficiency of proof.

D. In deciding that it would not examine into the question of whether there was satisfactory substantial evidence upon which a judgment can be based, where the proof of workhours is general and approximate, rather than specific, and the workhours schedule irregular rather than regular, the Circuit Court for the Second Circuit has rendered a decision which is in conflict with a decision of another Circuit Court of Appeals on the same matter (*Jax Beer Co.* v. *Redfern*, 124 F. 2d 172 [CCA 5]).

1. It is fundamental that the Supreme Court will exercise its appellate jurisdiction where important questions of general law involving novel issues are decided by the lower courts, and this has been especially true in cases brought under the provisions of the Fair Labor Standards Act (recent examples are the cases of *D. S. Schulte Inc.* v. *Gangi*, No. 517, writ granted November 19, 1945; *Anderson* v. *Clemens Pottery Co.*, No. 342, writ granted October 15, 1945).

2. The decisions of the Circuit Court of Appeals for the Second Circuit and of the District Court for the Southern District of New York disclose plain errors of law and certiorari should be granted to correct these errors (*Reynolds* v. *U. S.*, 292 U. S. 443, 54 S. Ct. 800; *Southern Railroad Co.* v. *Walton*, 284 U. S. 190, 52 S. Ct. 58; *Alaska Steamship Co.* v. *U. S.*, 290 U. S. 256, 54 S. Ct. 159).

The ruling of the District Court in striking the defense of account stated was erroneous and followed blindly the decisions in which it had been held that general releases are not valid defenses where no issue of fact was involved, but one of law. The practice of presenting employees with a statement of their workhours and wages due for straight time and overtime on paydays is increasing, and it is of importance to employers to know whether they may not avail themselves of this defense if years later, employees see fit to question the wages paid and come into court with a claim based on memory and approximations.

The defense of account stated, differently from the defense of release, does not cut down the amount of wages an employee is entitled to, but on the contrary searches for the truth of the matter and helps the trier of the facts to resolve the fact issues.

The Circuit Court, on this question, has merely followed the line of error taken by the District Court.

With regard to the defense of accord and satisfaction, this Court has already determined to resolve the sufficiency of such a defense where a *bona fide* dispute as to fact is involved (*D. S. Schulte* v. *Gangi*) and a similar question is here involved, relating to a pleading rather than to sufficiency of evidence. The Circuit Court has overlooked this important distinction.

With regard to the refusal of the Circuit Court to pass on the question of whether the evidence adduced by the plaintiffs can validly support a recovery, it is respectfully

submitted that the question involves a large question of judicial policy. In a case of this kind, where computations are the heart of recovery, and the testimony is general in character, the fact that there are many sworn contradictions destroying the accuracy of the general theory of recovery, and the fact that in one case, cross-examination succeeded in demolishing the claim of a plaintiff, while in the cases of the other two plaintiffs, their claims were shown to be mutually so repugnant that both cannot be true, but one must be deemed false, raises a very serious question as to whether there is substantial evidence to support a recovery, and whether the evidence can be deemed at all satisfactory.

Wherefore your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Second Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case entitled on its docket *Giorolomo DePasquale, Joseph Ciminna and William Morton, Plaintiffs-Appellees* v. *Williams-Bauer Corporation and Conti-Williams Corporation, Defendants-Appellants,* to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of said Circuit Court be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated, December ..7..., 1945.

EMANUEL TACKER,
Counsel for Petitioners.